



**Wachira v Golden Tea Traders & 3 others (Civil Application
E018 of 2024) [2025] KECA 254 (KLR) (21 February 2025) (Ruling)**

Neutral citation: [2025] KECA 254 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E018 OF 2024
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
FEBRUARY 21, 2025**

BETWEEN

SALOME WAMBUI WACHIRA APPLICANT

AND

GOLDEN TEA TRADERS 1ST RESPONDENT

JOSEPH SHUNDU LUTTA 2ND RESPONDENT

LILY K MUSINGA 3RD RESPONDENT

LAND REGISTRAR KILIFI 4TH RESPONDENT

(Being an application to withdraw and/or striking out the Notice of Appeal lodged against the Judgement and Decree of the Environment and Land Court of Kenya at Malindi (Olola, J.) delivered on 28th February 2020 in Malindi ELC No. 16 of 2015)

RULING

1. The Notice of Motion for consideration is dated 13th May 2024, and is filed by Salome Wambui Wachira (the applicant). At the outset, Golden Tea Traders (the 1st respondent) did not participate in the proceedings before the trial court. Learned counsel for the applicant, Mr. Omondi, thus withdrew this application against the 1st respondent which we allowed with no orders as to costs. Joseph Shundu Lutta and Lily K. Musinga (the 3rd and 4th respondents respectively) were duly served through the firm of their advocates, M/s. Wameyo Advocates, but they did not make an appearance, neither did they file their submissions as directed by the Deputy Registrar. This application therefore, proceeds between the applicant and the 2nd respondent (NCBA Bank (K) Limited).
2. The applicant is seeking the following orders, that:



- a. The Notice of Appeal dated 22nd July 2022 lodged in Environment and Land Court at Malindi on 26th July 2022 by the 2nd respondent be deemed as withdrawn;
 - b. In the alternative, the Notice of Appeal dated 22nd July 2022 lodged in the Environment and Land Court Registry at Malindi on 26th July 2022 be struck out; and
 - b. Costs of this application be awarded to the applicant.”
3. The application is supported by the applicant’s affidavit sworn on 13th May 2024. The applicant deposed that the trial court delivered the impugned judgement on 28th February 2020 in Malindi ELC Civil Suit No. 16 of 2015 from which decision the 2nd respondent appealed by filing a Notice of Appeal dated 22nd July 2022 and lodged at the Malindi Environment and Land Court on 26th July 2022; that, on 15th February 2024, the Deputy Registrar at Malindi ELC notified the 2nd respondent and the applicant that the proceedings were ready for collection upon payment of the requisite court fees; that, pursuant to rule 82 of the Court of Appeal Rules, 2022, the time for filing the appeal started running from 15th February 2024, and the appeal therefore, ought to have been filed within 60 days from this date; that in contravention of the law, the 2nd respondent filed the Memorandum and Record of Appeal 81 days outside the timelines; and that, in the circumstances, it is clear that the 2nd respondent lost interest in the appeal.
4. Further, the applicant deposed that the 2nd respondent had filed an application for review of the trial court’s judgement, which was heard and a ruling delivered on 9th January 2023 dismissing the said application; and that the 2nd respondent having elected to file a review application, and the same having been dismissed, it (the 2nd respondent) lost the right of appeal against the ELC’s judgement, and, consequently, no appeal lies against the trial court’s judgement. The applicant urged us to allow the application and deem the Notice of Appeal dated 22nd July 2022 and lodged on 26th July 2022 as withdrawn.
5. In response, vide a replying affidavit sworn on 22nd October 2024 by Stephen Atenya, the 2nd respondent’s Principal Legal Counsel, it is deposed that the application is fatally defective; that the defect is gleaned from it having been brought under two (2) provisions, being rules 85 and 86 of the Court of Appeal Rules, 2022; that, by the nature of the prayers sought, the application is founded on rule 86 and that, clearly, it has been filed out of time, the Notice of Appeal having been served on 26th July 2022.
6. The 2nd respondent contends that the Record of Appeal has since been filed and assigned a serial number, being Malindi Court of Appeal Civil Appeal No. E041 of 2024; and, as such, the relief being sought is moot. It is further deposed that the applicant was made aware through correspondences that the 2nd respondent could not file a competent appeal without certified proceedings, judgement, decree and a duly signed certificate of delay, which documents were only made available to the 2nd respondent on 17th October 2024.
7. As regards the filing of the application for review, the 2nd respondent conceded that it indeed filed it, but that no ruling emanates from it since it withdrew the application on 17th December 2021; and that, on the same day, 17th December 2021, it filed a Notice of Motion dated 17th December 2021 seeking stay of execution of the impugned judgment pending hearing and determination of the intended appeal in which both parties filed their respective submissions. The 2nd respondent asked that the instant application be dismissed with costs.



8. At the hearing of this application, learned counsel Mr. Omondi appeared for the applicant. He highlighted the applicant's submissions dated 24th October 2024. Counsel abandoned the prayer for striking out of the Notice of Appeal, and urged the application on two grounds. First, he submitted that the 2nd respondent lost his right to appeal when he filed the review application of the impugned judgement; that the assertion that the application was withdrawn cannot be substantiated as the alleged notice of withdrawal was never served upon the applicant, and neither did the court mark the application as withdrawn. In this regard, reliance was placed on the case of *Tharaka Nithi County Government & Another vs Gaichu & 129 Others (Civil Appeal No. 107 of 2021) (2022) KECA 585 KLR (8 July 2022) (Ruling)* for the proposition that a party cannot pursue an appeal and a review simultaneously.
9. Secondly, counsel submitted that the appeal was filed out of time; that the letter dated 20th December 2021 bespeaking the proceedings was filed more than 30 days from the date of the judgement; that the letter was written more than one year and nine months after judgment and that, therefore, the 2nd respondent cannot rely on the proviso to the relevant rule to justify the delay in filing the appeal; and that, even on the face of the letter, there is no indication that it was served upon the applicant.
10. It was counsel's further submission that the 2nd respondent cannot place reliance on the provisions of rule 84 of the Court of Appeal Rules, 2022 to argue that the proceedings were supplied late. We were accordingly urged to find that this was a proper case for the notice of appeal to be deemed as withdrawn.
11. Highlighting the submissions dated 23rd October 2024 on behalf of the 2nd respondent, learned counsel Mr. Kongere submitted that, since the applicant has abandoned the prayer for striking out the Notice and Memorandum of Appeal, it follows that the complaint that the 2nd respondent filed an application for review of the impugned judgment is no longer available to the applicant because that is not one of the grounds on which a Notice of Appeal can be deemed as withdrawn; and that the deeming provision becomes ineffective once a record of appeal has been filed as was held by this Court in the decisions of *Esther Anyango Ochieng vs. Transmara Sugar Company (2020) eKLR* and *KCB Bank Kenya Limited vs. Said (Suing as the administrator of the Estate of Tahir Sheikh Said Ahmed (Deceased) (2023) KECA 688 KLR*. On that basis, Mr. Kongere urged us to dismiss the application with costs since it is not disputed that the record of appeal has been filed.
12. We have considered the application, the affidavit in support of, and in opposition to, the application, the oral and written submissions by both counsel and the law. We are of the view that the issue which arises for determination is whether the Notice of Appeal is competent and properly filed before this Court.
13. We note from the outset that learned counsel Mr. Omondi abandoned the prayer for striking out of the Notice of Appeal. Instead, he chose to focus on the prayer that the Notice of Appeal be deemed as withdrawn. In making his arguments on this ground, counsel submitted on two points: that the Record of Appeal was filed out of time; and that the 2nd respondent opted to file an application for review of the impugned judgement in the first instance and that, when the same was dismissed in a ruling dated 9th January 2023, it filed the instant appeal. Mr. Omondi's argument was that a party cannot pursue both avenues and, therefore, the Notice of Appeal should be deemed as withdrawn.
14. On the part of the 2nd respondent, Mr. Kongere's contention is that the deeming of a Notice of Appeal as having been withdrawn is moot since the record of appeal has been filed.



15. Rule 85(1) of the Court of Appeal Rules, 2022 ('the Rules') provides as follows:

85(1) If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, that party shall be deemed to have withdrawn the notice of appeal and the Court may, on its own motion or on application by any other party, make such order.

16. A reading of the above rule demonstrates that a Notice of Appeal is deemed as withdrawn where an appeal is not filed within the appointed time. We have perused the documents annexed to both the Motion and the response. The Notice of Appeal which we have sight of, as annexed to the Motion, is dated 16th December 2021. However, in the body of the application, the applicant refers to a Notice of Appeal dated 22nd July 2022.

17. It is a well settled principle that parties are bound by their pleadings and, for this, we shall only refer to what we have on record, which is the Notice of Appeal dated 16th December 2021. The Notice of Appeal is against the judgement and decree of Olola, J. dated and delivered on 28th February 2020.

18. Rule 77(2) of the Rules provides that a Notice of Appeal should be filed within 14 days from the date of the decision which a party wishes to appeal against. Therefore, for all intent and purposes, the Notice of Appeal in the intended appeal by the 2nd respondent should have been lodged within 14 days from the decision rendered on 28th February 2020. However, the Notice of Appeal was filed on 16th December 2021, which is a clear testament that it is incompetent for having been filed outside the 14 days' period by over one year.

19. We are also alive to the requirement in rule 86 (1) of the Rules that stipulates that a party who wishes to have a Notice of Appeal struck out should do so within 30 days of the filing of the Notice of Appeal. However, the prayer for striking out was abandoned by the applicant.

20. Turning to the judicial authorities that the 2nd respondent relied on, the facts in the case of Esther Anyango Ochieng (supra) was that the application to strike out the Notice of Appeal was filed outside the period of 30 days, hence, this decision does not come to the 2nd respondent's aid. Similarly, the decision of KCB Bank Kenya Limited vs Said (supra) is neither helpful in that, unlike in this case, the Notice of Appeal in that case was filed on time.

21. The 2nd applicant knowing fully well that the Notice of Appeal itself had been filed out of time should have moved this Court to cure the misstep by seeking that it be admitted out of time, and be deemed as duly filed and served, but it failed to do so. We sympathise with the 2nd respondent because, in as much as the Record of Appeal was filed on 22nd October 2024 in Civil Appeal No. E041 of 2024, it does not cure the incompetent Notice of Appeal filed.

22. Accordingly, we find that the applicant's application dated 13th May 2024 is meritorious. It is hereby allowed in the result that the Notice of Appeal dated 22nd July 2022 is hereby deemed as withdrawn. The costs will be borne by the 2nd respondent.

23. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF FEBRUARY, 2025.

A.K MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.



.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

